CHEVRON MALAYSIA LIMITED v. NAGASARI KRISTAL SDN BHD & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
BADARIAH SAHAMID JCA
VERNON ONG LAM KIAT JCA
[CIVIL APPEALS NO: W-02-2762-12-2013, W-02-23-01-2014 & W-02-24-01-2014]
13 MAY 2015

CONTRACT: *Terms – Interpretation of terms – Dealership agreement – Self service petrol station – Installation of device – Whether charges imposed on operators of petrol station – Construction of terms – Whether letter from Ministry of Domestic Trade, Co-operatives and Consumerism read together with dealership agreement – Whether charges borne by petrol station – Whether charges fell outside basic fee as provided in dealership agreement*

EVIDENCE: *Documentary evidence – Agreed bundle – Interpretation of words in document – Failure to call maker – Whether authenticity of document doubtful – Whether necessary to call maker when document part of agreed bundle – Dispute in interpreting document – Whether to be assessed by court – Whether proper to invoke adverse inference under s. 114(g) Evidence Act 1950 for failure to call maker*

The defendant in the High Court *vide* suit no. S5-22-646-2008 was the owner/lessee of lands upon which petrol stations had been erected and the plaintiffs, pursuant to dealership agreements entered into with the defendant, were operators of petrol stations. The facts revealed that on 11 April 2000, the Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia ('KPDN') issued a letter ('the KPDN letter') to all petrol companies on the implementation of self service petrol stations. Pursuant to the said letter, the defendant installed an automated system at the petrol stations to enable petrol station operators to control fuel dispensing at the pump from an indoor point of sale console, which was a single point of sale indoors. The costs of the installation of the self service system were borne by the defendant. For petrol stations that had high actual or potential credit card sales transactions, the defendant installed integrated credit card payment facilities, which were linked directly to banks by analog leased lines. At these stations, the petrol station operator utilised indoor credit card readers for payments by credit card indoors and/or card reader in pumps ('CRIPS') at the pumps outdoors to enable credit card payments to be accepted outdoors. For other petrol stations, stand alone electronic data capture terminals were installed for credit card payments. The petrol station operators were charged by the defendant for the credit card payment facilities. Around 2006/2007, the defendant commissioned EMV compliant facilities that could be integrated to the self service system at the petrol stations. This was an improvement on

A the services provided under the CRIPS system. The components of the EMV facilities and infrastructure included, *inter alia*, indoor and outdoor payment terminals. The dispute between the parties related to the question of whether the defendant was legally obliged to provide and maintain the EMV system at no charge to the plaintiffs. In the High Court, the plaintiffs contended that
B the KPDN letter prohibited the defendant from imposing charges on the plaintiffs for the EMV system. On the other hand, the defendant argued that the costs referred to in the KPDN letter only includes all costs to implement the Sistem Khidmat Layan Diri ('SKLD') and the KPDN letter must be interpreted within the contextual framework of what were the requirements
C of the SKLD. The High Court decided, *inter alia,* that (i) the burden was on the plaintiff to prove that the KPDN letter prohibited the defendant from imposing the EMV charges on the plaintiffs; (ii) it was incumbent on the plaintiffs to call the maker of the KPDN letter to testify ; and (iii) an adverse inference was drawn against the plaintiffs pursuant to s. 114(g) of the Evidence Act 1950 for failing to call the maker of the KPDN letter. As for
D the defendant's counterclaim, it was decided, *inter alia,* that (i) the defendant failed to call the maker of the KPDN letter to prove that the costs of the installation of the SKLD equipment must be borne by the plaintiffs; (ii) the EMV charges fell outside the basic fee as provided in the dealership agreement; and (iii) the defendant ought to obtain the approval of the
E government to impose the EMV charges on the plaintiffs who had not consented to their imposition. Dissatisfied, the parties respectively appealed to this court *vide* civil appeal no: W-02-2762-12-2013 ('appeal 2762') heard together with civil appeal no. W-02-23-01-2014 ('appeal 23') and civil appeal no. W-02-24-01-2014 ('appeal 24'). Appeal 2762 was the defendant's
F appeal against part of the decision of the trial judge in: (i) ordering the defendant to repay the second, third, fourth, sixth, seventh, tenth and fifteenth plaintiffs any sums paid earlier by these plaintiffs in respect of EMV charges, and (ii) dismissing the defendant's counterclaim against these plaintiffs for payment of the EMV charges with costs. Appeal 23 was the
G second, third, fourth, sixth, seventh, tenth and fifteenth plaintiffs' appeal against part of the decision of the trial judge in: (a) dismissing the first, fifth, eleventh, twelfth and fourteenth plaintiffs' claims against the defendant with costs, and (b) allowing part of the defendant's counterclaim against the first, fifth, eleventh, twelfth and fourteenth plaintiffs for payment of the
H EMV charges with costs. Appeal 24 was the first, fifth, eleventh, twelfth and fourteenth plaintiffs' appeal against part of the decision of the judge in: (i) dismissing the first, fifth, eleventh, twelfth and fourteenth plaintiffs' claim against the defendant for declarations, *inter alia,* that the defendant was prohibited from imposing the EMV charges, and (ii) other ancillary orders. The issues that arose for consideration were (a) whether the trial
I judge was correct in invoking adverse inference under s. 114(g) of the Evidence Act 1950 against both the plaintiffs and the defendant for not

calling the maker of the KPDN letter; (b) whether the EMV system was part of the SKLD; and (c) whether the plaintiffs were contractually obliged to pay the EMV charges under the dealership agreements.

Held (dismissing appeal 2762; allowing appeals 23 and 24)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The KPDN letter was a document included under Part B of the common bundle of documents. Accordingly, formal proof of the KPDN letter had been dispensed with and the authenticity of the contents therein was an agreed fact. Given that the parties' position on the construction and meaning of the KPDN letter was at variance, it fell upon the learned judge to assess the evidentiary value of the relevant paragraph of the KPDN letter in the background of the material evidence adduced at the trial. Further, there was nothing to indicate any withholding or suppression of evidence by the parties. In the circumstances, it was not proper for adverse inference to be invoked. The judge misdirected herself on the law and erred in invoking adverse inference under s. 114(g) of the Evidence Act 1950. (paras 43, 44, 46 & 47)

(2) Prior to the implementation of the EMV, under the SKLD, petrol stations were equipped with indoor credit card readers for payments by credit card indoors and CRIPS at the pumps outdoors. Instead of using the existing magnetic strip credit cards, the EMV technology was based on chip based credit card. In order to implement the EMV system, petrol stations were equipped with a new set of facilities and infrastructure such as indoor and outdoor payment terminals, an electronic payment server, system security encryption module and other improved advance features. The old analog leased lines under the CRIPS were also replaced with the VSAT, a satellite communication network. EMV replaced CRIPS at the petrol stations operated by the plaintiffs. (paras 50-52)

(3) On a proper construction of the KPDN letter, EMV was part of SKLD. Accordingly, the defendant was not authorised to impose EMV charges on the plaintiffs. Further, the words 'basic fee' as stipulated in cl. 3.1.1 of the dealership agreement should be read within the context of the word 'facilities'. The type of facilities enumerated therein did not include payment at the pumps or EMV. This interpretation was also consistent with the description of the facilities for petrol station operations as contained in the Business Partner Information manual issued by the defendant. The facilities provided includes, *inter alia,* office building, forecourts (pump islands and driveway), dispensing pumps and underground tanks. The facilities, however, did not include payment at the pump or EMV. As such, there was no appealable error in the learned judge's decision of the construction of cls. 3.1.1 and 3.2 of the dealership agreement. (paras 53 & 55)

Case(s) referred to:
Henry Trading Co Ltd v. Harun [1966] 1 LNS 65 HC ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
MBf Finance Bhd v. Low Chee & Anor [2010] 1 LNS 1024 HC ***(refd)***
Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan [2007] 6 CLJ 192 CA ***(refd)***
Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 CLJ 35 CA ***(refd)***
Woodsvile Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Appeals [2010] 2 CLJ 1002 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(2)
Evidence Act 1950, s. 114(f), (g)
Rules of the Court of Appeal 1994, rr. 7(1), (3A)

(Civil Appeal No: W-02-2762-12-2013)
For the appellant - Brendan Navin Siva & Aida Haryani Salamon; M/s Brendan Siva
For the respondent - Jeremy Khalif Lee Pheng Yau; M/s Ravindran Khalif Lee

(Civil Appeal No: W-02-23-01-2014 & W-02-24-01-2014)
For the appellant - Jeremy Khalif Lee Pheng Yau; M/s Ravindran Khalif Lee
For the respondent - Brendan Navin Siva & Aida Haryani Salamon; M/s Brendan Siva

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: S5-22-646-2008]

Reported by Kumitha Abd Majid

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] These three appeals stem from the decision of the High Court given on 4 December 2013 in the same action.

[2] Appeal 2762 is the defendant's appeal against part of the decision of the trial judge: (i) ordering the defendant to repay to the second, third, fourth, sixth, seventh, tenth and fifteenth plaintiffs any sums paid earlier by these plaintiffs in respect of EMV charges, and (ii) dismissing the defendant's counterclaim against these plaintiffs for payment of the EMV charges with costs.

[3] Appeal 23 is the second, third, fourth, sixth, seventh, tenth and fifteenth plaintiffs' appeal against part of the decision of the trial judge: (i) dismissing the first, fifth, eleventh, twelfth and fourteenth plaintiffs' claims against the defendant with costs, and (ii) allowing the part of the defendant's counterclaim against the first, fifth, eleventh, twelfth and fourteenth plaintiffs for payment of the EMV charges with costs.

[4] Appeal 24 is the first, fifth, eleventh, twelfth and fourteenth plaintiffs' appeal against part of the decision of the trial judge: (i) dismissing the first, fifth, eleventh, twelfth and fourteenth plaintiffs' claim against the defendant for declarations, *inter alia,* that the defendant was prohibited from imposing the EMV charges, and (ii) other ancillary orders.

[5] In this judgment, the parties shall be referred to as they were in the court below. For convenience, the second, third, fourth, sixth, seventh, tenth and fifteenth plaintiffs in Appeal 23 shall be jointly referred to as the seven plaintiffs and the first, fifth, eleventh, twelfth and fourteenth plaintiffs in Appeal 24 as the five plaintiffs respectively.

The Salient Facts

[6] The defendant is the owner/lessee of lands upon which petrol stations have been erected.

[7] The plaintiffs are operators of petrol stations pursuant to dealership agreements entered into with the defendant.

[8] Sometime around 1996, the Government mandated that all petrol stations in the Klang Valley shall implement self-service system. The self-service system was implemented in the Klang Valley on 1 January 1997 and extended to the other major towns and other parts of the country beginning in April 1998.

[9] On 11 April 2000, the Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia ('KPDN') issued a letter to all petrol companies ('the KPDN letter') on the implementation of self-service petrol stations which was intended to start throughout the country in 1998. KPDN noted that as at 4 January 2000, the self-service system had already been implemented in the Klang Valley, Johor Bahru and Langkawi. KPDN decided to implement the self-service system in Ipoh, Perak from 1 June 2000. In para. 5 of the KPDN letter, it is stated as follows:

> Pihak tuan adalah diminta membuat persedian yang rapi untuk tujuan ini dan adalah ditegaskan sekali lagi bahawa segala kos bagi melaksanakan perkhidmatan layan diri termasuk pemasangan alat-alat otomasi dan senggaraan pembiayaan alat-alat tersebut adalah ditanggung sepenuhnya oleh syarikat minyak **dan tidak dikenakan sebarang caj samada secara langsung atau tidaklangsung kepada pengusaha-pengusaha stesen minyak.**
>
> (emphasis added)

[10] Pursuant thereto, the defendant installed an automated system at the petrol stations to enable the petrol station operators to control fuel dispensing at the pump from an indoor point of sale ('POS') console, which is a single point of sale indoors ('the Self Service System'). The costs of the installation of the Self Service System were borne by the defendant. No charges were imposed by the defendant on the petrol station operators for the Self Service System.

[11] For petrol stations that had high actual or potential credit card sales transactions, the defendant installed integrated credit card payment facilities, which were linked directly to banks by analog leased lines. At these stations, the petrol station operators utilised indoor credit card readers for payments by credit card indoors and or card reader in pumps ('CRIPS') at the pumps outdoors to enable credit card payments to be accepted outdoors. For other petrol stations, stand-alone electronic data capture ('EDC') terminals were installed for credit card payments. The petrol station operators were charged by the defendant for the credit card payment facilities.

[12] Due to the high incidence of credit card frauds worldwide, Europay, Mastercard and Visa combined to produce a series of standards for smartcard referred to as EMV that came into effect at varying dates in most countries. These standards included the introduction of chip-based credit cards that represented a more difficult method of payment to clone and hence a greater barrier to the production or cloning of illegal credit cards.

[13] Subsequently, in 2005 the Association of Banks in Malaysia mandated that no outdoor credit card transactions would be allowed from petrol stations if the petrol stations do not install and maintain equipment that could process and handle payments using credit cards with EMV technology.

[14] As such, the indoor credit card readers (using the analog leased lines) and CRIPS could no longer be used at the petrol stations as these only allow payments using magnetic strip credit cards. As an interim measure, the defendant utilised stand-alone electronic data capture ('EDC') terminals to all petrol stations. The EDC terminals were capable of accepting EMV based credit cards. However, it was not integrated to the possible system or the pump at the petrol station.

[15] Around 2006/2007, the defendant commissioned EMV compliant facilities that could be integrated to the Self Service System at the petrol stations. This was an improvement on the services provided under the CRISPs system. The components of the EMV facilities and infrastructure included, *inter alia*, indoor and outdoor payment terminals, an electronic payment server, security encryption module, VSAT (satellite communication network) and other improved and advanced features. The VSAT replaced the analog leased lines in the old system.

The Dispute

[16] In essence, the dispute between the parties relates to the question of whether the defendant is legally obliged to provide and maintain the EMV system at no charge to the plaintiffs.

[17] The plaintiffs' contention is that the letter dated 11 April 2000 issued by Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia ('the KPDN letter') prohibits the defendant from imposing charges on the plaintiffs for the EMV system.

[18] On the other hand, the defendant's contention is that the costs referred to in the KPDN letter only includes all costs to implement the Sistem Khidmat Layan Diri ('SKLD') and the KPDN letter must be interpreted within the contextual framework of what were the requirements of the SKLD.

[19] Instead of making payments for the EMV charges or allowing the EMV system to be removed by the defendant, the plaintiffs filed the action and obtained an interlocutory injunction: (i) to restrain the defendant from imposing the EMV charges, and (ii) to restrain the defendant from removing the EMV system.

[20] The defendant filed a counterclaim for the EMV charges not paid by the plaintiff to the defendant.

Findings Of The High Court

[21] The findings of the trial judge may be summarised as follows:

Plaintiffs' Claim

(i) the plaintiffs' entire case rested on the KPDN letter;

(ii) the burden of proving that the KPDN letter prohibits the defendant from imposing the EMV charges on the plaintiffs was on the plaintiff;

(iii) the proper interpretation of the words in the KPDN letter must be within the contextual framework of what were the requirements of KPDN in terms of the implementation of the SKLD. Thus, it was incumbent on the plaintiffs to call the maker of the KPDN letter to testify as to the meaning to be ascribed to para. 5 of that letter; and

(iv) the court drew an adverse inference against the plaintiffs for failing to call the maker of the KPDN letter pursuant to s. 114(f) of the Evidence Act 1950.

Defendant's Counterclaim

(i) the defendant also failed to call the maker of the KPDN letter to prove that the costs of the installation of the SKLD equipment must be borne by the plaintiffs;

(ii) the defendant ought to seek redress from the Association of Banks, Malaysia because it was responsible for mandating the installation of the EMV system in the petrol stations;

(iii) the seven plaintiffs ought to have been given a choice by the defendant whether they wished to have the EMV system installed at their petrol stations and it was inequitable for the defendant to compel them to make payment of the EMV charges;

(iv) it is the banks and the supplier of the EMV system and the company which has been appointed by the defendant to provide the service support and the maintenance for the installation which stood to benefit more than the plaintiffs from the installation of the EMV system at the petrol stations operated by the plaintiff;

(v) the EMV charges fall outside the basic fee as provided in the dealership agreements; and

(vi) the defendant ought to obtain the approval of the government to impose the EMV charges on the plaintiffs who have not consented to their imposition

Defendant's Preliminary Objection

[22] At the hearing of the appeals, counsel for the defendant informed the court that the plaintiffs had filed two affidavits seeking to adduce further evidence without leave on the grounds that they are purportedly matters which have occurred after the date of the decision from which the appeals are brought. Counsel's objection to the filing of the said affidavits is premised on the grounds that leave of court must be sought and obtained prior to the filing of the same (*Woodsvile Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Appeals* [2010] 2 CLJ 1002; *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35). Further, counsel argued that the plaintiffs have not satisfied the special grounds under r. 7(3A) of the Rules of the Court of Appeal 1994 ('RCA 1994').

[23] In reply, counsel for the plaintiffs argued that the Court of Appeal has full discretionary powers to receive further evidence by affidavit (r. 7(1) RCA 1994; s. 69(2) of the Courts of Judicature Act 1964). However, he conceded that he had no authorities to support his proposition. He also submitted that it was necessary to look at the judgment of the High Court in the other action to consider the finding of fact relating to CRIPS.

[24] After hearing submissions of counsel, the court took the view that the plaintiffs ought to have applied for leave to adduce the further evidence. As no prior leave had been obtained, the affidavits filed by the plaintiffs were expunged from the appeal record.

Defendant's Submission

[25] Counsel submitted that at the time when the KPDN letter was issued, there were no credit card payment facilities at the pumps outside. The KPDN did not regulate credit card payment facilities. Credit card payment facilities were installed by the defendant as an extra facility for the convenience of the customers. It is not part of the self-service facilities. Further, the KPDN has not taken any action against the defendant for charging the EMV charges.

[26] Counsel also argued that the EMV charges form part of the 'basic fee' of cl. 3.1.1 of the dealership agreements, being a fee payable to be so determined by the defendant from time to time at its sole discretion with reference to the facilities at the petrol stations. In 2005, letters were issued by the defendant to the plaintiffs informing of the EMV charges to be imposed for the new EMV card system pilot station. The new facilities included credit card payment facilities which did not exist back in 1995. Similar cl. 3.1.1 are also to be found in dealership agreements signed in 2008. Be that as it may, counsel conceded that the *contra proferentum* rule applied against the defendant insofar as the dealership agreements *vis a vis* the plaintiffs.

[27] Counsel also submitted that the question is whether the EMV is part of CRIPS. The trial judge was correct in holding that the question can only be answered with evidence for KPDN. The trial judge erred in holding that the plaintiffs failed to apply for subpoena when in fact the plaintiffs did. At any rate, the plaintiffs closed their case without applying to court for process to compel the witnesses to attend court. There was in the circumstances, no suppression of evidence. The trial judge erred in invoking the adverse inference under s. 114(g) of the Evidence Act 1950.

[28] At any rate, the defendant is not relying on the KPDN letter as the basis to impose the EMV charges. Instead, the defendant is relying on cl. 3.1.1 of the dealership agreements for the imposition of the EMV charges on the basis that the EMV facilities are facilities provided by the defendant at the petrol stations. This was not challenged by the plaintiffs in any way. The EMV charges form part of the basic fee payable by the plaintiffs to the defendant. The trial judge erred in holding that cls. 3.1.1 and 3.2 of the dealership agreements cannot be construed to include the EMV charges because there are no words in the said clauses to include 'facilities for payment for petrol or fuel purchased by customers'.

[29] Counsel also submitted that at the point of time when the defendant wanted to install the EMV system, letters were issued by the defendant to the plaintiffs to say that they had the option to take part in the EMV card system pilot station project and that if they did, the defendant would bear the installation costs and the plaintiffs would be charged usage costs. These letters were the notices issued to the plaintiffs with regard to the EMV charges pursuant to cl. 3.2 of the dealership agreements. In this instance, the plaintiffs agreed to use the system but refused to pay. The imposition of the EMV charges on the plaintiffs is strictly contractual. There are petrol stations without the EMV system as EMV system is not mandatory for all petrol stations. Accordingly, the plaintiffs are obliged to pay the EMV charges to the defendant under the dealership agreements.

[30] The trial judge's finding on the question of who stood to benefit more from the implementation of the EMV system was a misdirection in law and in fact. This issue only surfaced at the trial in the evidence of PW1 and DW1 in answer to questions posed by the trial judge. The trial judge erred in making a finding on this issue as it is not part of the pleaded case of the parties and it cannot be a basis for the dismissal of the defendant's counterclaim.

[31] It was also argued that the trial judge erred in finding that CRIPS was part of the SKLD. The witness who testified in that suit was not involved in the decision making process. In the CRIPS system, there was a sharing of the costs; the defendant bore the costs of installation and the plaintiffs paid the costs of usage.

Plaintiffs' Submission

[32] In reply, counsel argued that the judge's finding that CRIPS is part of SKLD is correct. According to the defendant's business partner manual (1998) given to all petrol station operators, the CRIPS is for the implementation of the SKLD.

[33] Counsel also referred to Maybank's letter to the defendant dated 25 April 2005 which shows that there is a difference between the CRIPS and the EMV system; the EMV system can accept chip based credit cards whereas the CRIPS system cannot. Counsel also referred to Lampiran 1 of the KPDN's letter dated 27 June 2008 to support the contention that once credit card facilities are available at pumps, the system in place is the SKLD system.

[34] The fact that credit card facilities are available at pumps is self-evident. In support of his contention, counsel referred to the defendant's letter dated 15 May 2013 attaching a generic diagram of the Retail Site Management System ('RSMS') which shows the facilities at a petrol station; in particular, it also shows credit card readers attached to the pumps. Therefore, it was argued that credit card readers and pump controls are integrated.

[35] As for the interpretation of the KPDN letter, learned counsel submitted that it is an agreed Part B document; as such it is not necessary to call the maker of the document to prove the document (*Henry Trading Co Ltd v. Harun* [1966] 1 LNS 65; [1966] 2 MLJ 281, at p. 282 (FC)). The court should look at the words of the document and interpret it accordingly (*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693, at p. 706 (SC); *Mohd Nazari Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601, at p. 606; *MBf Finance Bhd v. Low Chee & Anor* [2010] 1 LNS 1024; [2011] 7 MLJ 621). It was submitted that on a proper construction para. 5 of the KPDN letter includes CRIPS and EMV.

[36] Counsel also referred to the decision of the High Court in another action (KL High Court Civil Suit No: 22-NCVC-501-08-2013) where the question of whether CRIPS was part of SKLD was considered. In that case, the Pengarah Bahagian Perdagangan Dalam Negeri of KPDN testified the

CRIPS was considered as part of SKLD and that based on the KPDN letter, all costs and expenses related to SKLD which includes CRIPS and later EMV, were to be borne by the oil companies and not the petrol station operators. In that case, the trial judge found that CRIPS is part of SKLD and that since CRIPS is the predecessor of EMV, EMV is part of SKLD. The RM700 monthly charge on the CRIPS is made under the business partner manual and not under the dealership agreement. According to cl. 3 of the dealership agreement, the basic fee is charged quarterly whereas the variable fee is charged monthly. The CRIPS monthly fee is neither a variable or basic fee. The defendant needed the plaintiffs' consent to charge it.

[37] Counsel also took the point that the judge erred in invoking the adverse inference against the plaintiffs for not calling the maker of the KPDN letter. There is no evidence of withholding or suppression of evidence by the plaintiffs (*Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 (SC); *Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan* [2007] 6 CLJ 192; [2007] 7 MLJ 289 (CA)).

[38] Counsel also argued that KPDN's prior approval is needed for the EMV charges on the plaintiffs. The trial judge was correct in holding that the defendant ought to obtain the approval of the government to impose the EMV charges on the plaintiffs who have not consented to their imposition. The trial judge's finding is supported by: (i) the KPDN letter which states that any charges whether direct or indirect ('sebarang caj sama ada secara langsung atau tidak langsung') cannot be charged to the petrol station operators; (ii) KPDN's letter dated 3 January 2002; (iii) KPDN's letter dated 22 March 2006; and (iv) the Tatacara attached to KPDN's letter dated 27 June 2008.

[39] Counsel further argued that the plaintiffs are not contractually obliged to pay the EMV charges. The trial judge was correct in holding that cls. 3.1.1 and 3.2 of the dealership agreement cannot be construed to include the EMV charges because there are no words in the said clauses to include 'facilities for payment for petrol or fuel purchased by customers'. Counsel argued that the trial judge is correct for two reasons. First, the defendant describes the EMV charges as 'automation fee'. Second, the basic fee clauses in the dealership agreements speak of a sum payable quarterly for facilities in the petrol station and that all the defendant had to do was to impose and inform the dealers. The dealers would then be required to comply without qualification. The 'facilities' for which the basic fee is charged is set out in the defendant's Business Partner Information Manual and it does not include payment at the pumps or EMV. Third, based on the basic fee clauses, if it is correct that the EMV charges were part of the basic fee, all that the defendant had to do was to issue a document or memorandum stating that EMV charges are imposed as part of the basic fee. The dealers would then have no choice but to comply without qualification. But the defendant did not do this.

[40] In this respect, the consent of the five plaintiffs is immaterial. The trial judge gave judgment against the five plaintiffs because she found that they had consented to the EMV installation. However, the five plaintiffs testified that they signed the consent letters without knowledge of the KPDN letter and that as such their consent must be qualified. In any case, as there was no KPDN approval, the defendant could not have imposed and collected the EMV charges. The consent of the five plaintiffs is immaterial. Further, as the defendant did not challenge their evidence on this point, the defendant must be deemed to have accepted it as the correct version.

[41] Counsel then argued that the trial judge would have found in favour of the five plaintiffs if she had evaluated the evidence of the five plaintiffs, in particular to the fact that (i) KPDN had prohibited the defendant from imposing or collecting EMV charges, (ii) no KPDN approval was obtained by the defendant to impose and collect the EMV charges, (iii) the defendant is deemed to admit that the five plaintiffs signed the consent letters without knowledge of the KPDN letter and therefore their consent ought to be qualified. Accordingly, counsel submitted that appellate intervention is warranted to correct the error.

Decision

[42] After hearing submissions of counsel, we are of the considered view that there are essentially three main issues in this appeal.

[43] The first relates to the question of whether the trial judge was correct in invoking the adverse inference under s. 114(g) of the Evidence Act 1950 against both the plaintiffs and the defendant for not calling the maker of the KPDN letter. The KPDN letter was a document included under Part B of the common bundle of documents. Accordingly, formal proof of the KPDN letter had been dispensed with and the authenticity of the contents therein was an agreed fact (*Henry Trading Co Ltd v. Harun* [1966] 1 LNS 65; [1966] 2 MLJ 281 (FC)).

[44] In this connection, it is necessary to allude to the guidelines enunciated by the former Supreme Court in *Jaafar Shaari* (*supra*) at p. 706:

> First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling, eg their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such documents is liable to be challenged in court at the instance of either of the parties.
>
> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in

examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any written hearsay contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal.

[45] In this case, it is the plaintiffs' contention that the KPDN letter prohibits the defendant from imposing the EMV charges on the plaintiffs. In contrast, the defendant contends that the costs referred to in the KPDN letter only relate to SKLD.

[46] Given that the parties' position on the construction and meaning of the KPDN letter is at variance, it falls upon the trial judge to assess the evidentiary value of the relevant paragraph of the KPDN letter in the background of the material evidence adduced at the trial.

[47] We have perused the appeal record and are satisfied that there is nothing to indicate any withholding or suppression of evidence by the parties. In the circumstances, we do not think that it was a proper case for the adverse inference to be invoked. Accordingly, we are constrained to hold that the trial judge misdirected herself on the law and had erred in invoking the adverse inference under s. 114(g) of the Evidence Act 1950.

[48] The second issue relates to the question of whether on a proper construction of para. 5 of the KPDN letter the EMV system is part of the SKLD. If so, then it follows that the defendant is not authorised to impose the EMV charges on the plaintiffs.

[49] The SKLD is in effect a self-service system. According to the Tatacara, under SKLD, customers are required to make payment first before fuelling and that payment is to be made by cash or credit card at the counter or by using the credit card at the pumps. It is clear that under SKLD, there are three methods of payment for fuel: (i) by cash at the cashier counter, (ii) by credit card at the cashier counter; or (iii) by credit card at the pumps.

[50] Prior to the implementation of the EMV, under the SKLD petrol stations were equipped with indoor credit card readers for payments by credit card indoors and card readers in pumps ('CRIPS') at the pumps outdoors. At the material time, the credit card readers could only process magnetic strip credit cards.

[51] Instead of using the existing magnetic strip credit cards, the EMV technology is based on chip-based credit card. To implement the EMV system, petrol stations were equipped with a new set of facilities and infrastructure such as indoor and outdoor payment terminals, an electronic payment server, system security encryption module and other improved and advanced features. The old analog leased lines under the CRIPS were also replaced with the VSAT, a satellite communication network.

[52] In addition, it is in the defendant's own evidence that the EMV is integrated with the pump system so as to enable the customer to be able to purchase fuel by using credit card at the pumps. If the EMV is disconnected from the pumps, the customer cannot purchase fuel using EMV at the pumps. In short, the facts as disclosed in the evidence points clearly to the fact that EMV replaced CRIPS at the petrol stations operated by the plaintiffs. For the foregoing reasons, it must therefore follow that EMV is part of SKLD.

[53] For the foregoing reasons, on a proper construction of para. 5 of the KPDN letter, we find that that EMV is part of SKLD. Accordingly, we hold that the defendant is not authorised to impose EMV charges on the plaintiffs.

[54] Be that as it may, we now turn to the question of whether the plaintiffs are contractually obliged to pay the EMV charges under the dealership agreements. The defendant contends that it is entitled to impose the EMV charges as part of the basic fee under cl. 3 of the dealership agreement.

[55] We are in agreement with the submission of counsel for the plaintiffs that the words 'basic fee' in cl. 3.1.1 should be read within the context of the word 'facilities'. We note that the type of facilities enumerated therein does not include payment at the pumps or EMV. This interpretation is also consistent with the description of the facilities for petrol station operations as contained in Business Partner Information Manual issued by the defendant. According to this document, the facilities provided include office building, forecourts (pump islands and driveway), dispensing pumps, underground tanks, remote or suction fuel dispensing system, air compressors and pre-set air meters, firefighting equipment, effluent discharge filtration, signages and utility facilities. The facilities do not include payment at the pump or EMV. Accordingly, we are not satisfied that there is any appealable error in the trial judge's decision on the construction of cls. 3.1.1 and 3.2.

[56] By reason of the foregoing, the defendant's appeal is without merit. Appeal 2762 is therefore dismissed. Appeals 23 and 24 are allowed. The plaintiffs' claim in prayers (1), (2), (3), (6) and (9) are allowed. We order costs as agreed in the sum of RM40,000.